

**BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

IN THE MATTER OF INQUIRY	§	GN DOCKET NO. 00-185
CONCERNING HIGH-SPEED ACCESS	§	
TO THE INTERNET OVER CABLE	§	
AND OTHER FACILITIES	§	
	§	
IN THE MATTER OF INTERNET	§	
OVER CABLE DECLARATORY	§	
RULING	§	
	§	
IN THE MATTER OF APPROPRIATE	§	CS DOCKET NO. 02-52
REGULATORY TREATMENT FOR	§	
BROADBAND ACCESS TO THE	§	
INTERNET OVER CABLE FACILITIES	§	

**COMMENTS OF THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF
TEXAS**

NOW COMES THE STATE OF TEXAS (State), by and through the Office of The Attorney General of Texas, Consumer Protection Division and files these its comments on the Notice of Proposed Rulemaking released March 15Th, 2002 in FCC Order No. 02-77. These comments are timely filed pursuant to the Commission's subsequent order in DA-02-909.

The Office of the Attorney General submits these comments as the representative of state agencies and state universities as consumers of telecommunications services in the State of Texas, the enforcer of state laws prohibiting anti-competitive acts and practices, and the enforcer of laws for the protection of consumers in Texas. Our comments are limited to issues that arise directly from the Commission's tentative conclusion as to the nature of cable modem services. We agree with the Commission that high speed access to the internet is a critical piece of the telecommunications marketplace and serves to facilitate local competition in that marketplace, a primary goal of the

1996 Federal Telecommunications Act. Effective competition must exist before cable modem services are further deregulated. For this reason, it is vital to maintain regulatory requirements which will keep high speed access to the internet open to competition and also maintain effective consumer protection.

Tentative Conclusion

The OAG first comments on the tentative conclusion of the Commission that cable modem services - whether provided over a third party internet service provider's ("ISP's") facilities or self-provisioned ISP facilities - are information services subject to regulation under the Title I of the Act. ¶s33 & 38 of the *Notice*. We agree that while this may arguably be one conclusion, it is not a complete conclusion and does not fully address other important issues which are relevant to meeting the Commission's previously and widely stated goal of advancing high speed access to the internet regardless of the platform used.

The categorization of services as either telecommunications services, cable services, or information services are not mutually exclusive, contrary to the statement in ¶41 of the *Notice of Proposed Rulemaking*. A cable modem service provider could easily be selling its regular cable programming, an information service through an ISP, and also providing voice over IP telephony and/or local exchange services, which are arguably telecommunications services. It would be fundamentally unfair to allow cable modem service providers to offer telecommunications services to customers without also obligating them to meet the regulatory requirements applicable to other providers of the identical services, the most important of these requirements being open access. Cable modem service is fundamentally both an information service, the ISP element, AND a high-speed transport for the data which is the source of the information. This is seen most obviously by

the fact that ISP services are offered through dial-up, wireline broadband and cable modem. The internet service remains the same and this is the “information service” component focused upon by the Commission in its tentative conclusion. These services are therefore not easily or correctly categorized as one type, but a hybrid of all three.

Cable modem services are not in and of themselves information services as they are really just a means of providing high speed transport of the ISP information to the customer. Because of the inherent duality of the nature of these services it is incumbent upon the Commission to proceed cautiously and to avoid an absolute reclassification of these services as purely information services to which few common carrier or consumer protection obligations attach.

Cable Services

As correctly reflected in ¶60, the Commission has concluded that cable modem service is not a traditional cable service, as the very essence of such a service is a one way transmission of data to the subscriber. See ¶61. The very fact that the Commission can so easily conclude that cable modem service is not a cable service should lead to a serious inquiry as to what the service is, since it does not in any meaningful way seem to be equivalent to the provision of cable television programming. We believe this should cause an inquiry as to what services cable modem services are most like, rather than an abrupt and immediate conclusion that they are information services only.

A rational regulatory scheme must treat like services in as close to the same manner as the law will allow. We believe the Commission has the authority to create such a category of services for both cable modem services and wireline broadband services, which are essentially identical services as far as the customer is concerned, but for the type of wire over which the services are provided. The Commission should use its authority to ensure equivalent treatment for these types

of services, and most especially, if it chooses to maintain open access requirements for one, then such requirements should apply equally to the other. All such services could be classified as “advanced telecommunication capabilities “as suggested by AT&T in ¶70.

New Regulatory Framework

In its *Notice* at ¶77-78, the Commission references the need for a consistent regulatory framework. This Office agrees that such a framework is necessary, is possible under Title 1 authority to regulate interstate information services, and should be based upon a hybrid of requirements which apply to telecommunications service providers, cable service providers and information service providers. The following current telecommunications service provider requirements must apply to cable modem service providers:

1. Open access requirements; and
2. Consumer protection requirements.

The reasons for the necessity of the application of these requirements to cable modem services are provided in more detail below.

Open Access Obligations Should Apply.

Due to the continued infancy of the state of development of competition, and the fact that cable modem is by far the dominant means of provision of high speed service to residential users, a requirement of open access to all ISP's should apply to cable modem service providers. Otherwise, carriers not affiliated or contracting with cable modem service providers will be unable to provide service on a competitive basis to a huge section of the marketplace and will continue to fail and there will actually be less availability of service to consumers than is currently the case. Competitive ISPs must be allowed open access for the purpose of providing their own services to

customers on an equivalent basis. This could be accomplished through an unbundling regime similar to that applicable to telecommunications service providers or through contractual negotiations.

Consumer Protection Obligations.

These comments are provided in response to the request in ¶ 108 of the *Notice*. Customer protection requirements may well be sacrificed if cable modem services are reclassified as purely information services. This would remove many of the obligations that consumers have come to expect would be fulfilled by their service providers. There would, at a minimum, be uncertainty as to the obligations of cable modem service providers under state and local consumer protection laws, at least until such time as the Commission could establish rules clarifying which requirements do and do not apply. We would prefer that the protections found in the regulation of telecommunications services such as those established for Customer Proprietary Network Information (CPNI), truth-in-billing, and slamming, apply to these services as well. They are essential elements of the consumer protections which are expected by consumers in the marketplace. This marketplace is not yet developed and competitive to the point that consumer protection issues will solve themselves through competition, as the technology and terminology is still too new to expect consumers to be expert enough to always adequately protect themselves. The fact that there is an element of information service also being provided to the consumer does not change the underlying rationale for the imposition of these requirements on ALL providers of information services, whether supplied over cable modem or wireline.

With respect to our comment on the role of the state and local authorities as requested in ¶ 98, we do not believe that services should be classified in any manner which dilutes the current authority of state and local authorities to regulate them under currently applicable state and local

laws. This will assist the state and local authorities in enforcing customer protection laws, consistent with our comments above, and also will not interfere with the ability of states and localities to manage their rights-of-way. Any classification of cable modem service should be made in such a way that it is clear that these rights remain.

The Office of the Attorney General of Texas appreciates this opportunity to provide comment on this Notice of Proposed Rulemaking.

Respectfully submitted,

JOHN CORNYN
Attorney General of Texas

HOWARD G. BALDWIN, JR.
First Assistant Attorney General

JEFFREY S. BOYD
Deputy Attorney General for Litigation

PAUL D. CARMONA
Chief, Consumer Protection Division

MARION TAYLOR DREW
Public Agency Representation Section Chief

ROGER B. BORGELT
Assistant Attorney General
State Bar No. 02667960
Consumer Protection Division
Public Agency Representation Section
P.O. Box 12548
Austin, Texas 78711-2548
Voice: (512) 475-4170
Fax: (512) 322-9114
E-Mail: roger.borgelt@oag.state.tx.us

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